SUPREME COURT, U.S.
WASHINGTON, D. C. 20543

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In The

Supreme Court of the United States

October Term, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,

Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *ET AL.*,

Respondents

No. 76-528

CONSUMERS POWER COMPANY,

Petitioner

v.

NELSON ASCHELIMAN, *ET AL.*,

Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS BALTIMORE GAS AND ELECTRIC COMPANY, *ET AL.* IN NO. 76-419

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BRIEF FOR RESPONDENTS BALTIMORE GAS AND ELECTRIC COMPANY, *ET AL.* IN NO. 76-419

OPINIONS BELOW

These consolidated cases involve review of two decisions of the United States Court of Appeals for the District of Columbia Circuit. In No. 76-419, the opinion below, *Natural Resources Defense Council, Inc.* v. *United States Nuclear*

Regulatory Commission, together with separate statements by Chief Judge Bazelon and Judge Tamm, was issued on July 21, 1976, *App.* 28-86, and corrected by an order of the court of appeals issued on October 8, 1976, *App.* 87-88. The opinion as corrected is reported at 547 F.2d 633. The uncorrected version of the opinion is unofficially reported at 9 ERC 1149.

In No. 76-528, the opinion below, *Aeschliman* v. *United States Nuclear Regulatory Commission,* was also issued on July 21, 1976. *App.* 89-111. It is officially reported at 547 F.2d 622 and unofficially reported at 9 ERC 1289.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1976. Vermont Yankee's petition for a writ of certiorari was filed on September 21, 1976. That petition was granted on February 22, 1976. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2350(a) (1970).

Respondents Baltimore Gas and Electric Company, *et al.,* intervenor respondents in *NRDC* v. *NRC, supra,* filed a petition for a writ of certiorari with this Court on October 19, 1976 (No. 76-548). That petition is presently pending. Baltimore Gas and Electric Company, *et al.* are nominal respondents in No. 76-419 by operation of Rule 21(4) of the Rules of this Court, and are filing this brief at this time in support of petitioner Vermont Yankee also pursuant to Rule 21(4).

QUESTIONS PRESENTED

This brief addresses only the following issues raised in the petition for a writ of certiorari filed by petitioner Vermont Yankee:

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1. Did the court of appeals apply an erroneous standard of review in determining the adequacy of the uranium fuel cycle rulemaking record?
2. Did the court of appeals have authority to direct the use of special rulemaking procedures on remand of portions of the Uranium Fuel Cycle Rule?

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are set forth in the Appendix to this brief:

1. Administrative Procedure Act §§ 4, 10(e), 5 U.S.C. §§ 553, 706 (1970) (A-1 through A-3)
2. Atomic Energy Act of 1954 § 189, 42 U.S.C. § 2239 (1970) (A-3 through A-4)
3. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1970 & Supp. V 1975) (A-4 through A-7)
4. 10 C.F.R. § 51.20(e) (1977) (A-7 through A-9)

STATEMENT OF THE CASE

The uranium fuel for nuclear power plants in the United States is produced, used, and reclaimed in a multistep "fuel cycle" ending with the disposal or management of residual wastes.[1] In November 1972 the Atomic Energy Commis-

[1] The steps in the complete uranium fuel cycle include mining and milling of uranium ore, its chemical conversion to a usable form, its enrichment in fissionable isotopes of uranium, its fabrication into fuel, its fissioning in a reactor to produce power, reprocessing of spent fuel, disposal or management of radioactive waste, and associated transportation links. Of these steps only fissioning of fuel and temporary storage of spent fuel and waste take place at nuclear power plants. The other activities in the fuel cycle occur elsewhere and are subject to stringent licensing requirements distinct from those governing nuclear power plants. A policy statement by President Carter on April 7, 1977 proposes to defer the commercial reprocessing of spent reactor fuel. If effectuated, this policy would affect the "back end" of the fuel cycle, *i.e.*, the reprocessing and waste management/disposal steps.

sion[2] began a rulemaking to collect and summarize information on those environmental effects of each step in the uranium fuel cycle which might be attributable to the annual operation of a nuclear power plant. The rulemaking's conclusions, as crystallized in a so-called Table S-3, were ordered by the Commission to be included thereafter in the environmental impact statement prepared as part of the agency's review of every proposed nuclear power plant. The court of appeals in the decision below upheld most aspects of Table S-3, but set aside the parts of it relating to the reprocessing and waste management steps of the fuel cycle.

I.
Administrative Proceedings

The Commission commenced its rulemaking on the Environmental Effects of the Uranium Fuel Cycle with a *Federal Register* notice published on November 15, 1972. 37 Fed. Reg. 24191, *App.* 352. The notice proposed amendments to the agency's environmental review regulations and announced the availability of an Environmental Survey underlying the proposed rule.[3] The notice also set forth Table S-3,

[2] The Atomic Energy Commission (AEC) was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (Supp. V 1975), which also created the Nuclear Regulatory Commission (NRC) and transferred to it the AEC's licensing and regulatory functions, 42 U.S.C. §§ 5841(a), (f), 5871. Hereinafter, the term "Commission" applies to both the AEC and the NRC as appropriate.

[3] Compiled by the Commission's Regulatory Staff, the report bore as its full title "Environmental Survey of the Nuclear Fuel Cycle" (November 1972). The Environmental Survey was not intended to be a detailed environmental impact analysis of each discrete phase of the uranium fuel cycle. 39 Fed. Reg. 14188 (April 22, 1974), *App.* 385. Rather, it described on an annualized basis the environmental effects of the uranium fuel cycle attributable to a typical nuclear power plant and presented the methodology and assumptions used by the Regulatory Staff in arriving at its conclusions. Pertinent portions of the Environmental Survey and of its subsequent revision (WASH-1248, *infra* n.8) are set forth at *App.* 538-646, 1194-1339.

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a tabular summation of the Environmental Survey's findings. The notice solicited public comment on the Environmental Survey and Table S-3, and stated that the Commission would subsequently hold a legislative-type hearing on the proposal to amend its regulations by adopting Table S-3 as a standard quantitative depiction, for reactor licensing purposes, of the annual environmental effects throughout the uranium fuel cycle attributable to reactor operation. 37 Fed. Reg. 24191, 24193, *App.* 352, 358-59. All interested persons were provided an opportunity to become participants in the rulemaking. 37 Fed. Reg. 24193, 38 Fed. Reg. 49, 50 (1973), *App.* 359, 361, 363. Respondents Baltimore Gas and Electric Company, *et al.*, participated jointly in the rulemaking hearing.

On January 3, 1973, the Commission by notice established a three-member Hearing Board and provided that participants could make oral statements as well as written submissions. 38 Fed. Reg. 49, *App.* 361.

Several weeks prior to the hearings, the Commission made available in its Public Document Room the background studies, internal Regulatory Staff calculations and other supporting materials used in preparing the Environmental Survey, as well as prior drafts of the Survey as edited by the Regulatory Staff. 39 Fed. Reg. 14188, 14190-91 (1974), *App.* 385, 397.

Only one rulemaking participant, respondent Consolidated National Intervenors (CNI), asked for additional documents and that request was promptly honored. 39 Fed. Reg. 14189 n. 2, *App.* 390 n. 2.

A "Procedure Planning Session" was held on January 17, 1973 to schedule the appearance of witnesses and to discuss and refine further the procedures previously set forth in the notice of rulemaking. The Hearing Board indicated that it would question the Regulatory Staff and other participants.

Transcript 4, 5 [hereinafter cited as "Tr."], *App.* 658, 659; *see* 38 Fed. Reg. 50 (1973), *App.* 362. The Hearing Board also asked that the participants be accompanied at the hearings by expert witnesses able to answer technical questions, so as to aid the Board's development of a complete, informative record for the Commission. Tr. 20, *App.* 670-71. All participants were allowed to submit pre- and post-hearing written material, including rebuttal to the written and oral statements made by the Regulatory Staff and other participants.

At the hearings, held February 1-2, 1973, respondent Natural Resources Defense Council (NRDC) was represented by respondent CNI. Testimony was presented by the Regulatory Staff, CNI and NRDC, and nine other participants including Baltimore Gas and Electric Company, *et al.* Written comments were received from 46 individuals and groups. No testimony was excluded or limited for irrelevancy, duplication, or any other reason. Throughout the proceeding, the Board voiced its desire for a complete record and encouraged the participants—particularly CNI—to submit their views fully.[4]

Respondent CNI, at the Procedure Planning Session, did not request that any procedures be employed at the rulemaking beyond those set forth in the notice of hearing. At the hearings themselves, however, CNI offered what amounted to a counterproposal to the scheduled rulemaking: namely, that the Commission conduct an ongoing "full generic hearing on the question of the nuclear fuel cycle, which is subject to full adjudicatory rights," including discovery and cross-examination on all issues. Tr. 217-18, *App.*

[4] *E.g.*, Tr. 20, 43, 338-41, 395, 452-53, 517-18; *App.* 671, 688, 936-38, 951-52, 1000-01. The transcript of these hearings is set forth almost in entirety at *App.* 655-1023.

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844. CNI further argued that the proposed rule must "at some stage in the procedure be subjected to the full adjudicatory rights under the Administrative Procedure Act." Tr. 338, *App.* 936.

In response, Baltimore Gas and Electric Company, *et al.* and other participants contended that, in order to establish a right to such special procedures, CNI and NRDC first had a duty to specify questions of substantial importance that could not be resolved by existing procedures.[5] CNI and NRDC, while expressing general misgivings on various technical issues,[6] never attempted to make such a showing.[7]

Upon conclusion of the oral hearings, the record was left open by the Hearing Board for 30 days pursuant to the notice of hearing; numerous participants took advantage of this opportunity to file further comments. *App.* 367-68. CNI requested and was granted an additional period to file its post-hearing submissions, and the participants were then granted the opportunity to file comments on each others' post-hearing submissions. *App.* 368. Thereafter, the Hearing

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[5] *E.g.*, Tr. 52, 436-38, 444, 468-71, 475-80, *App.* 694, 983-84, 994, 1013-16, 1019-22. Reply of 14-Member Utility Group to CNI-UCS "Statement with Respect to Legal Considerations" of March 2, 1973 at 8-13 (March 16, 1973).

[6] CNI and NRDC's technical presentations took two forms: oral testimony at the hearings by Drs. Edward P. Radford, Jr. and Henry W. Kendall, and the submission on March 9, 1973 of written supplementary comments. Dr. Radford made general comments and responded to questions from the Board on occupational radiological exposure in mines, at power plants and at reprocessing facilities. Tr. 219-63, *App.* 845-78. Dr. Kendall spoke generally to and was questioned on hypothetical accidents at power plants, the diversion of fissionable material for illegal purposes, and the management of radioactive wastes. Tr. 263-304, *App.* 879-910. The supplementary comments outlined certain high-level waste storage techniques and addressed the radiological effects of a fuel reprocessing plant in New York which ceased operation in 1971.

[7] See text 30-33 *infra* & accompanying notes.

Board, in accordance with the notice of hearing, issued its report to the Commission describing the proceedings before it and identifying issues raised therein, and certified the hearing record to the Commission for decision. *App.* 364-84.

After reviewing the fuel cycle rulemaking record and other related data available to it, the Commission revised the Environmental Survey,[8] including Table S-3, and issued its Uranium Fuel Cycle Rule, which required that the values set forth in revised Table S-3 be factored thereafter into the cost-benefit analyses for all proposed nuclear power plants. 39 Fed. Reg. 14188 (1974), *App.* 385.[9] Following issuance of the final rule, NRDC and CNI petitioned for its review in the U. S. Court of Appeals for the District of Columbia Circuit; Baltimore Gas and Electric Company, *et al.* were parties to that appeal as intervenor respondents.

II.

The Opinion Of The Court Of Appeals

On July 21, 1976, the United States Court of Appeals for the District of Columbia Circuit, in an opinion by Chief Judge Bazelon with Judge Tamm concurring in the result, held that the waste disposal and reprocessing portions of the rulemaking record did not evidence sufficient "ventilation" of those issues, and vacated and remanded those portions of the fuel cycle rule. *NRDC* v. *NRC*, 547 F.2d 633, 647, 655 (D.C. Cir. 1976), *App.* 28, 51-52, 71. Judge Bazelon also wrote a "Separate Statement" taking specific issue

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[8] Environmental Survey of the Uranium Fuel Cycle (WASH-1248), April 1974 [reprinted in pertinent part at *App.* 1194-1339].

[9] The Uranium Fuel Cycle Rule has been codified at 10 C.F.R. § 51.20(e) (1977).

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with the opinions expressed in Judge Tamm's concurrence and setting forth the philosophical underpinnings of the majority's approach to judicial review. 547 F.2d at 655-657, *App.* 72-77.[10]

So far as rulemaking procedures were concerned, the majority observed that respondents' "primary argument" below was that the Commission's decision to preclude " 'discovery or cross-examination' denied them . . . due process." 547 F. 2d at 643, *App.* 43. The majority was unable to find that the procedures used by the Commission were fundamentally unfair or that they did not comply with the requirements of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* (1970 & Supp. V 1975) or the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970 & Supp. V 1975) (APA).[11] Instead, it recast NRDC and CNI's procedural challenge. According to the majority, CNI's argument was "not that cross-examination was required *per se*,

[10] The court of appeals in its decision also remanded the reactor operating license which had been issued to Vermont Yankee Nuclear Power Corporation, petitioner in No. 76-419. The fuel cycle rulemaking and Vermont Yankee cases had been consolidated by the court of appeals for briefing and argument. On the same day the court of appeals decided the related case of Aeschliman v. NRC, 547 F.2d 622, App. 89 (D.C. Cir. 1976), which also involved, *inter alia*, the issue of the validity of an NRC reactor license issued to Consumers Power Company's Midland nuclear plant. Finally, on November 9, 1976 the court of appeals remanded *per curiam* an NRC license which had been issued pursuant to the fuel cycle rule to Long Island Lighting Company's Shoreham station. Lloyd Harbor Study Group, Inc. v. NRC, No. 73-2266 (D.C. Cir. Nov. 9, 1976) (*per curiam*). The petitions for certiorari filed on behalf of Vermont Yankee in the consolidated rulemaking-licensing case (No. 76-419), and on behalf of Consumers Power Company in its related *Aeschliman* case (No. 76-528), were consolidated by this Court when it granted certiorari. Petitions for certiorari filed by respondents Baltimore Gas and Electric Company, *et al.* from the fuel cycle rulemaking case (No. 76-548) and by Long Island Lighting Company from the related *Lloyd Harbor Study Group* case (No. 76-745) are presently pending before this Court.

[11] For brevity's sake, references to the APA will hereinafter be made to the United States Code section numbers.

but that the procedures utilized by the Commission were in the aggregate inadequate sufficiently to ventilate the issues." 547 F.2d at 644 n.25, *App.* 45 n.25.

Relying on this characterization, the majority went on to enunciate a new standard for judicial review of informal rulemaking. It stated that it must determine "whether the procedures provided by the agency were sufficient to ventilate the issues." 547 F.2d at 643, *App.* 44. The majority also suggested that fulfillment of an agency's responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970 & Supp. V 1975) (NEPA), might require the use of procedures beyond those traditionally employed in informal rulemaking. 547 F.2d at 645 & n.34, *App.* 48 & n.34.

Since the majority believed that assessment of "agency procedures requires that the reviewing court immerse itself in the record," 547 F.2d at 644-45, *App.* 47, it examined certain portions of the record to ascertain if issues were "ventilated" to its satisfaction.[12] The majority then indicated in some detail why it believed that there was "an insufficient record to sustain . . . the numerical values in Table S-3" relating to nuclear waste disposal. 547 F. 2d at 647-53, *App.* 52-66. It never, however, explained why it thought the considerable record on reprocessing was deficient. The majority's entire treatment of the matter consists of three repetitions of the term "reprocessing" (547 F. 2d at 647, 654, 655, *App.* 51-52, 67-68, 71), with neither discussion nor analysis of the relevant record or any weaknesses perceived in it.

[12] In response to an NRC motion to correct the opinion, the court, *per curiam*, deleted on October 8, 1976 each of the majority opinion's three emphatic but erroneous assertions that the Hearing Board, in its failure to ensure a fully "ventilated" record, had not conducted any examination of the NRC Staff's expert witness on waste management, Dr. Frank Pittman. *Compare* App. 61 (lines 3-5), 61 n.53, 68 n.59 *with* 547 F.2d at 651, 651 n.53, 654 n.58.

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Having found certain deficiences which it believed showed the need for ventilation, the majority ordered "procedural devices" on remand in excess of those required by statute. 547 F.2d at 653-54, *App.* 67-68. The majority opined that perhaps a "more sensitive, deliberate" application of procedures used in the original rulemaking proceeding would suffice, 547 F.2d at 653-54, *App.* 67, but strongly implied that some special combination of adversarial procedures—which it listed—might be necessary to produce proper "ventilation." *Id.*[13] The majority also indicated the possibility that "no combination of the procedures mentioned above will prove adequate, and the agency will be required to develop new procedures. . . ." *Id.*

Judge Tamm, rejecting the majority's preoccupation with the use of adversarial procedures as inconsistent with decisions of this Court and likely to wreak havoc in the administrative process, found no merit in the majority's conclusions regarding rulemaking procedures. 547 F.2d at 658-61, *App.* 78-86.

III.

Events Since The Court Of Appeals' Decision

Since July 21, 1976, the Commission has undertaken a series of actions relative to its nuclear licensing responsibilities in light of the court of appeals' decision of that date.

The Commission's first step was to issue, on September 13, 1976, a General Statement of Policy (41 Fed. Reg. 34707). That document stated that the Commission would reopen the record of the uranium fuel cycle rulemaking on the issues of reprocessing and waste management and that

[13] The inventory of the majority's procedural catalogue included "informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees comprised of outside experts with differing perspectives, limited cross-examination, funding independent research by intervenors, detailed annotation of technical reports, surveys of existing literature, [and] memoranda explaining methodology." 547 F.2d at 653, *App.* 67.

the Commission's staff had been directed to produce, on an expedited basis, an adequately documented revision to the Environmental Survey treating these issues. The General Statement of Policy also imposed a moratorium on the issuance of any operating licenses or construction permits pending issuance of an interim rule; reopened the *Vermont Yankee* and *Midland* operating license proceedings on various issues including the question whether these licenses should be continued, modified or suspended pending promulgation of an interim rule; and permitted requests to show cause why any other nuclear power plant licenses should not also be modified or suspended pending issuance of an interim rule.

On October 13, 1976 the Commission issued a notice announcing the availability of a revision to the portions of its previous Environmental Survey dealing with reprocessing and waste management. 41 Fed. Reg. 45849 (October 18, 1976). Concluding that the revision would be adequate to support issuance of an interim rule described in the notice, the Commission proposed to issue such a rule while proceedings directed toward promulgation of a revised final rule were going forward, and requested comment on this proposal. *Id.*

The Commission promulgated a Supplemental General Statement of Policy on November 5, 1976. 41 Fed. Reg. 49898 (November 11, 1976). In it the Commission announced that it would not initiate, *sua sponte,* show cause proceedings against reactor licensees on fuel cycle rule grounds, and that it was suspending show cause proceedings already in progress, pending issuance of an interim rule. The Commission also indicated that it would permit resumption of licensing on the basis of the fuel cycle values in effect on July 21, 1976 provided that use of values set forth in the proposed interim rule would not tilt the environmental cost-

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benefit balance against the plant. One consideration in the Commission's decision was its confidence in the breadth and quality of the analysis in the revised Environmental Survey —whose values were not significantly different from those in the previous Environmental Survey and accompanying fuel cycle rule. 41 Fed. Reg. at 49899.

On March 7, 1977 the Commission issued its "final-interim" fuel cycle rule, indicating the treatment to be given fuel cycle issues in reactor licensings pending the completion of remand proceedings and issuance of a final revision to the fuel cycle rule. 42 Fed. Reg. 13803 (March 13, 1977). The values embodied in this "final-interim" rule were not significantly different from those contained in either the earlier proposed interim rule or the rule which had been vacated on July 21, 1976. The final interim rule was accompanied by a second revision to the Environmental Survey, which took into account and responded to the public comments received on the previous (October 1976) revision to the Environmental Survey.

Finally, on May 20, 1977 the Commission issued a notice of reopened rulemaking on the fuel cycle rule. 42 Fed. Reg. 26987 (May 26, 1977). The notice suggested consideration of the effects of alternative configurations of the uranium fuel cycle, in order to account for recent policy proposals by the President that the use of plutonium fuel in commercial reactors (and therefore the development of breeder reactors and the commercial use of reprocessing technology) be deferred.

SUMMARY OF ARGUMENT

When reviewing informal rulemaking, a court must engage in a substantive inquiry into the entire administrative record (1) to ascertain whether the agency has acted within

the scope of its authority, (2) to determine if all relevant factors were considered, (3) to make certain that the agency did not abuse its discretion, and (4) to ensure that the actual choices made were not arbitrary, capricious, or otherwise not in accordance with law. The procedural method by which the rulemaking record is actually developed, however, assuming compliance with statutory requirements, is ordinarily a matter within the discretion of the agency. Thus, even where a court finds a record inadequate and remands it for further proceedings, it may not, except in extraordinary circumstances, limit agency discretion as to the procedures to be followed in those proceedings. The majority below erroneously short-circuited these requirements in its review of the uranium fuel cycle rulemaking record and ignored these principles in remanding portions of that record on procedural grounds.

Agencies may, and often do, go beyond statutory procedural minima in rulemakings. And, in a number of recent informal rulemakings involving particularly complex factual questions, certain agencies have employed "hybrid" (mixed adjudicatory-legislative) procedures tailored to promote full disclosure and consideration of all relevant factors. However, the court below erred in holding that participants in rulemakings have a "right" to such procedures merely because the proceeding involves complex fact-policy issues or environmental considerations.

Finally, if a reviewing court finds an agency rulemaking record inadequate to support a challenged regulation, the regulation must be set aside and the record remanded. Unless a rulemaking participant has shown a special need for particular procedures over and above those required by statute, however, the agency on remand should be free to employ whatever procedures it deems appropriate so long as it considers all pertinent factors, fully responds to rele-

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vant substantive issues timely raised, and fully discloses the bases for its conclusions. No such showing of need for special procedures was made during the uranium fuel cycle rulemaking.

ARGUMENT

In recent years, administrative agencies have increasingly turned to rulemaking to resolve complex factual as well as policy issues.[14] This has been particularly evident in the emerging fields of energy and environmental regulation where disputes over policy are substantial, issues are factually complicated and technologically sophisticated, the affected interests are numerous, and the need for action is often compelling. In an effort to foster unusually well developed records in such rulemakings, certain agencies, including the NRC, have occasionally provided participants with procedures beyond those explicitly required by their organic statutes and the APA.

Until now, however, this Court has not had occasion specifically to address the proper standard for judicial review of such hybrid rulemakings, or to involve itself in their procedural mechanics. Prior decisions here have instead focused on the standard for review of and procedural requirements associated with informal agency action in more traditional settings, *e.g.*, *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to*

[14] While the choice between proceeding by general rule or individual adjudication to establish agency policy is one that lies primarily within the informed discretion of the agency, SEC v. Chenery Corporation, 332 U.S. 194, 203 (1947), the advantages of rulemaking over individual adjudication in the formulation of general regulations or agency policy have been recognized by this Court, agencies themselves, and various commentators. *E.g.*, United States v. Storer Broadcasting, 351 U.S. 192 (1956); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8365-8369 (1965); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970).

Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971); *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

A number of the courts of appeals, on the other hand, have examined the standard for review of and procedural requirements associated with these complex fact-policy rulemakings in emerging areas of regulation.[15] Generally, those courts have applied the standard of review for informal agency rulemaking set forth in the APA and decisions of this Court.[16] They have also required rigorous compliance with statutory procedural requirements. But, unlike the court below, they have not required more, in the absence of a particularized showing of necessity during the proceeding before the Agency.[17] Nor, prior to the decision below, has any court indicated that NEPA contains requirements for rulemaking procedures more extensive than those otherwise required by the agency's organic statute, the APA or constitutional considerations of fundamental fairness.

I.

On Appeal Of Informal Rulemaking, A Court Must Engage In A Substantive Inquiry Into The Adequacy Of The Rulemaking Record, But May Not Substitute Its Judgment For That Of The Agency

Stripped of its rhetoric, the standard of review pronounced by Judge Bazelon, writing for the majority below, can be

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[15] *E.g.*, Ethyl v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976); Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

[16] *E.g.*, Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974); Camp v. Pitts, 411 U.S. at 141-43; *Overton Park*, 401 U.S. at 416.

[17] *See* text 29-30 *infra* & accompanying notes.

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quickly summarized. Courts are "institutionally incompetent" to engage in substantive review of factually complex and technically sophisticated rulemaking and they should not attempt to do so. *NRDC* v. *NRC*, 547 F.2d at 657, *App.* 76 (separate statement of Bazelon, C.J.). Instead, they should concentrate their efforts on requiring of agencies "innovative" procedural formats "to improve the quality of decisionmaking." *Id.* And, if the procedures employed by the agency are not to the court's liking, the record must be remanded and the agency compelled to provide procedures on remand in excess of those required by statute.[18] This approach is inconsistent with the standard for judicial review of informal rulemaking set forth in section 706 of the APA, 5 U.S.C. § 706 (1970).

Section 706 of the APA provides that a court must set aside informal[19] "agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or that are "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C) & (D)

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[18] While the opinion below is rife with statements indicating that the procedures employed by the Commission must provide for sufficient "ventilation" of the issues and "dialogue" between the agency and participants in the rulemaking, *see, e.g.*, NRDC v. NRC, 547 F.2d at 643, 644, 646, 653, App. 44, 46, 49-50, 67, the judicial philosophy underlying these statements is most clearly set forth in Judge Bazelon's separate opinion. Indeed, the separate opinions of both Judges Bazelon and Tamm underscore the majority's preoccupation with extrastatutory procedures as a kind of *deus ex machina* in rulemaking.

[19] Although the terms "informal" and "formal" agency action are not defined by the APA, this Court has termed "informal" any agency action not required by statute to be based "on the record" after opportunity for hearing. *See Allegheny-Ludlum*, 406 U.S. at 757-58. Conversely, agency action subject to an "on the record" requirement is "formal" action. Thus, whether rulemakings are "formal" or "informal" agency action depends primarily upon their statutory origin.

(1970). The court must engage in a "substantial inquiry" to ascertain whether these three standards have been met. *Overton Park*, 401 U.S. at 415. And, while a presumption of regularity attaches to agency action, the court should not hesitate to undertake a "thorough, probing and in-depth" review of the rulemaking record. *Id.* If the review demonstrates that the agency acted beyond the scope of its authority,[20] failed to resolve the substantive issues before it in a rational fashion, or ignored statutory procedural requirements, then the agency action must be set aside.[21]

When determining whether an agency has resolved the substantive issues before it in a rational fashion, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416.[22]

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[20] There is no dispute here as to whether the Commission acted within the scope of its statutory authority in promulgating Table S-3. The Atomic Energy Act grants the Commission broad power to promulgate regulations "necessary to carry out the purposes" of the Act, 42 U.S.C. § 2201p (1970). As the court below recognized, the Commission clearly has authority under NEPA to resolve questions involving the environmental impacts of the uranium fuel cycle by rulemaking rather than individual adjudication. NRDC v. NRC, 547 F.2d at 641 n.17, *App.* 39-40 n.17; *see* Kleppe v. Sierra Club, 427 U.S. 390 (1976).

[21] These three provisions are "separate standards," and to be lawful, informal agency action must comply with all of them. *Overton Park*, 401 U.S. at 413.

[22] Thus, for a rule to have adequate support in the record the agency must have before it information on all relevant factors, give serious consideration to those factors, and present a reasoned explanation of its progress from its initial assumptions to its final conclusions, in light of those factors. The agency must articulate a rational connection between the facts found and the choices made. *Bowman Transportation*, 419 U.S. at 285. Conversely, it would be "arbitrary" or "capricious" for an agency not to take "into account all relevant factors" in making its decision. Hanly v. Mitchell, 460 F.2d 640, 648 (2nd Cir. 1972). And, while agency action will be upheld if the "agency's path may reasonably be discerned," the court "may not itself supply a reasoned basis for the agency's action that the agency has not given." *Bowman Transportation*, 419 U.S. at 485-86, *citing* Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (1945) and SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

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But the court in evaluating the record may not substitute its judgment for that of the agency. *Id., Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. at 285-86.

In other words, the standards set forth in section 706 of the APA do not require the courts to steep themselves in the technical merits of each agency decision they review. But they do require a court to make a searching and careful examination of the fact finding, fact predicting and factual reasoning processes which led the agency to adopt a particular rule in order to ensure that the agency fulfilled its obligation to give serious consideration to all reasonable contentions and evidence pertinent to the proposed regulation before it. *See City of Chicago* v. *FPC*, 458 F.2d 731, 742-43 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

The opinion of the majority below makes clear that it paid little attention to these requirements of section 706. Instead of engaging in substantive review of the adequacy of the fuel cycle rulemaking record, the court examined the procedures employed by the Commission to see if they were sufficient to "ventilate" issues which it, but not necessarily the Commission, deemed critical.[23]

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[23] Judge Bazelon's concerns about the "institutional incompetency" of judges to engage in substantive review are simply not borne out by past judicial efforts. Indeed, they stand in marked contrast to the en banc opinion of the District of Columbia Circuit in Ethyl v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976):

> There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. . . . The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. Market St. Ry. v. Railroad Comm'n, 324 U.S. 548, 559-561 (1945). The immersion in the evidence is designed *solely* to

The untenability of this substitution of procedural for substantive review is reflected in the majority's rather cavalier treatment of the reprocessing portion of the rulemaking record. The record of the fuel cycle rulemaking contains extensive testimony, comments and other information on the subject of the environmental effects of reprocessing.[24] Yet nowhere in the majority opinion does the court explain the basis of its conclusion that the reprocessing record is inadequate or even identify a single deficiency in that part of the record. Apparently, the majority believed it had no obligation to point out any such deficiencies. Under the majority's theory of review it needed only to find that the procedures used in the rulemaking did not fully "ventilate" certain issues regarding waste disposal in order to remand the entire

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enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 416; Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. at 285, 290.

541 F.2d at 36 (citations conformed) (emphasis in original).

[24] *See, e.g.*, Environmental Survey F-1 to -41, *App.* 580-609; WASH-1248, *supra* n.8, F-1 to -40, *App.* 1243-91; Tr. 84-86, 130-38, 244-50, 312-20, 412-15, 484-85, *App.* 766-68, 811-17, 864-68, 916-22, 965-68; General Electric Company, Comments on the Supplementary Comments by the Union of Concerned Scientists 1-2 (undated), *App.* 1153; State of New York, Comments on the Environmental Survey 2-8 (January 18, 1973), *App.* 648-54; General Electric Company, Supplemental Written Statement 5-7 (March 1, 1973), *App.* 1028-30; Staff Summary Comments on Proceeding for Environmental Effects of the Uranium Fuel Cycle 43-52 (March 19, 1973), *App.* 1058-64; CNI-UCS Supplementary Comments 3.1-3.50 (March 19, 1973), *App.* 1108-51; New York State Atomic Energy Council Comments on the Supplementary Comments by the Union of Concerned Scientists 1-6 (April 13, 1973), *App.* 1155-61; Response of 14-Member Utility Group to "Supplementary Comments" of CNI-UCS 6-21 (April 13, 1973), *App.* 1172-85; Nuclear Fuel Services, Inc. Response to Union of Concerned Scientists 1-7 (April 16, 1973), *App.* 1186-92.

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record on both waste disposal and reprocessing to the agency.[25]

In other words, the majority's theory of judicial review sanctions remand of an administrative record as inadequate without identification of those areas which must be corrected or supplemented. Unless this theory is rejected by this Court, more such remands could result. The courts of appeals must not be permitted to substitute review of the procedures utilized in a rulemaking for a thorough review of the adequacy of the rulemaking record.[26].

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[25] The fact that an agency, on remand, must follow the dictates of the reviewing court, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940), carries with it the necessary implication that reviewing courts must be specific in their directions to the agency. Other courts have consistently met this responsibility by clearly identifying those areas of the record in which further information or explanation is needed. *E.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 388, 394, 398, 399 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (DC. Cir. 1971); Carnevale v. Gardner, 393 F.2d 889, 891 (2d Cir. 1968). By not explaining the grounds for its remand of the reprocessing part of the Uranium Fuel Cycle Rule, the court has, therefore, failed to fulfill its obligation to the Commission.

Moreover, blanket remands without any articulation can only lead to unnecessary delay in the administrative process. Not only will agencies on remand be unable to narrow their attention to particular areas of concern but, if an agency guesses wrong, the court may remand the rule again to correct a deficiency it could have easily identified at the outset. This Court should make clear that a reviewing court has the obligation to articulate the grounds for its decisions so that those affected by them will be able to respond in an expeditious and efficient manner.

[26] In remanding without explanation, the court of appeals also failed to fullfill its obligation to provide this Court with an adequate basis for appellate review. As the Tenth Circuit recently observed:

> Here, the district court concluded that agency action was arbitrary and capricious, but . . . [it did not offer any] statement of which facts in the administrative record, or the absence thereof, were relied on in reaching its conclusion.
>
> With basis for the district court's disposition of the matter obscure, proper appellate review is precluded.

Hill v. Morton, 525 F.2d 327, 328 (10th Cir. 1975).

II.
The Procedural Holdings Of The Court Of Appeals Are Without Foundation In The Atomic Energy Act, The APA Or NEPA

Having found that issues involving the waste management and reprocessing portions of the fuel cycle rule were not, in its judgment, sufficiently "ventilated," the court remanded those portions of the rule to the Commission and directed further proceedings with additional procedures beyond those specified in the Atomic Energy Act or the APA.[27] The majority's belief that such procedures are required *per se* either by NEPA or by the complex nature of the fuel cycle rulemaking is without foundation.[28] Similarly, the majority's pro-

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[27] The majority proposed an entire litany of additional procedures for the Commission's consideration, *see* note 13 *supra*. However, the court stopped short of directly ordering the Commission to choose from among these procedures by speculating that perhaps "the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice." NRDC v. NRC, 547 F.2d at 653-54, *App.* 67. Of course this statement in itself has the effect of *requiring* procedures on remand which exceed those mandated by the Atomic Energy Act and the APA, since the procedures used by the Commission already went beyond statutory requirements. In any event, the court made certain its point would not be lost on the Commission: "It may be that no combination of the procedures mentioned above will prove adequate, and the agency will be required to develop new procedures. . . ." *Id. See also id.* at 658, *App.* 79 (Tamm, J, Separate statement concurring in result): "The majority appears to require the Commission to institute further procedures of a more adversarial nature than those customarily required for informal rulemaking by the Administrative Procedure Act . . . ."

[28] The implication of the majority below that extrastatutory rulemaking procedures will somehow automatically result in an "adequate record" indicates serious confusion as to the nature of the administrative record to be reviewed by the court. The uranium fuel cycle rulemaking proceeding was clearly "informal" agency action. *See* note 29 *infra*. Review of informal rulemaking "is to be based on the full administrative record" that was before the agency when it made its decision. *Overton Park*, 401 U.S. at 420. It is not to be limited to information contained in the transcript of a hearing held by the agency. Pacific Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965). Thus, the ade-

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cedural directives for the remand proceeding conflict with holdings of this Court and the courts of appeals which require a showing of substantial need for such procedures by participants during the rulemaking proceeding.

A. The Procedures Used In The Uranium Fuel Cycle Rulemaking Satisfied The Requirements Of The Atomic Energy Act, The APA And NEPA

Recognizing that neither the Atomic Energy Act nor the APA expressly required procedures even as extensive as those provided to participants in the Uranium Fuel Cycle rulemaking,[29] the majority below sought to find support in NEPA for its procedural holdings. Thus, the majority stated that

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quacy of the record of an informal rulemaking depends not so much on the procedures afforded participants at a hearing the agency might hold as on whether the agency has considered all of the relevant factors, examined all of the available information and disclosed that information to the public. *See text* 24-28 *infra* & accompanying notes.

[29] In interpreting the hearing requirements of the Atomic Energy Act, the District of Columbia Circuit in Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968), observed that:

> [s]ection 2239(a) [189(a)] of the Atomic Energy Act does not, in its reference to a hearing, distinguish in terms between adjudicatory and rule-making proceedings. . . . In neither kind of proceeding does the statute say explicitly that that hearing must be on the record. The Commission has, however, invariably distinguished between the two, and has provided formal hearings in licensing cases, as contrasted with informal hearings in rulemaking proceedings confined to written submission and non-record interviews. . . .

400 F.2d at 785. As a result, the court in *Siegel* held that the rulemaking hearing required by the Atomic Energy Act was satisfied by compliance with section 553 of the APA and that the Commission need not employ the procedures of sections 556 and 557 of that statute. 400 F.2d at 785-86, *cited with approval in Allegheny-Ludlum*, 406 U.S. at 757; *see also Florida East Coast Ry.*, 410 U.S. at 226-28. Thus, the Commission was required by the Atomic Energy Act and the APA to afford participants in the fuel cycle rulemaking only those procedures specified in section 553 of the APA. Nonetheless it provided procedures which clearly went beyond those requirements.

agencies may be required to "develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking." *NRDC* v. *NRC*, 547 F.2d at 653, *App.* 67. This assertion is without support in NEPA or decisions of this and lower courts.

NEPA contains no requirement that an agency hold hearings on the environmental consequences of its proposed actions. *Lathan* v. *Brinegar*, 506 F.2d 677, 689 (9th Cir. 1974); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 657 (10th Cir. 1971). *See Aberdeen & Rockfish RR. Co.* v. *SCRAP*, 422 U.S. 289 (1975) (*SCRAP II*). All it requires procedurally is that once an impact statement is prepared it must then follow the "existing agency review processes." 42 U.S.C. § 4332(2)(C) (1970). Of course, a hearing may be a part of an "existing agency review process," and while participants in such hearings should be afforded the same procedural rights with respect to NEPA issues as they are with respect to other issues, they need not be afforded more. *See Calvert Cliffs' Coord. Comm.* v. *AEC*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971); *Greene County Planning Bd.* v. *FPC*, 455 F.2d 412, 422 (2d Cir. 1972); *see also, SCRAP II*, 422 U.S. at 320; *Cf. Kleppe* v. *Sierra Club*, 427 U.S. 390, 405-06 (1976).

The majority's reliance on the complex nature of the fuel cycle rulemaking as a prop to support its statements concerning the need for extrastatutory procedures is similarily misplaced. The majority's fascination with the use of "innovative" procedural formats in complex rulemakings demonstrates little understanding of the requirements of section 553 of the APA. That section sets forth procedures which, if complied with fully, will ordinarily be sufficient to ensure both agency consideration of "all relevant factors" and development of a record sufficient for judicial review under section 706.

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Section 553 of the APA requires an agency to give public notice of "the legal authority under which the rule is proposed" and of "either the terms of the substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b) (1970). The agency must provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c) (1970). Finally, after "consideration of the relevant matter presented" the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.*[30]

The brevity of section 553 does not leave it without force. To the contrary, its three broad procedural requirements encompass stringent substantive responsibilities designed to assist judicial review as well as to provide fair treatment for persons affected by a rule.

The courts have recognized that the notice provision of section 553 imposes on agencies a standard of full disclosure and that an agency must to the best of its ability clearly articulate in the notice of proposed rulemaking the facts and assumptions on which it intends to rely.[31] *Portland Cement*

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[30] In certain situations oral hearings may also be a vital part of the informal rulemaking process. American Airlines v. CAB, 359 F.2d 624, 632 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966). Whether such hearings are required by due process, however, varies from case to case in accordance with differing circumstances. FCC v. WJR, The Goodwill Station, 337 U.S. 265, 276 (1949).

[31] Of course, this notice requirement "does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed." *International Harvester*, 478 F.2d at 632 & n. 51. Nevertheless, since an obvious prerequisite to the ability to make meaningful comment is to know the basis on which the rule is proposed, agencies should be held to full and rigorous compliance with section 553(b). *See Portland Cement*, 486 F.2d at 392-93.

Ass'n v. *Ruckelshaus*, 486 F.2d 375, 392-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *see International Harvester*, 478 F.2d at 649. Thus, if empirical predictions constitute a substantial basis for agency action, the agency's predictive methodology must be set forth so that interested participants have an opportunity to study and challenge it. *See Portland Cement*, 486 F.2d at 392; *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1251 n. 39 (D.C. Cir. 1973); *International Harvester*, 478 F.2d at 649.

The full disclosure requirement of the notice provision of section 553 was clearly complied with in the uranium fuel cycle rulemaking. The original notice of proposed rulemaking fully set forth the background to the Commission's proposed action and two alternative proposals, provided for a 60-day period for submission of comments, and gave notice of the oral hearing at which all interested members of the public were invited to submit additional statements. 37 Fed. Reg. 24191 (1972), *App.* 352. Indeed, no participant in the rulemaking proceeding has claimed that the agency failed to disclose adequately the nature and purpose of the Uranium Fuel Cycle Rule.

The full disclosure responsibility implicit in the notice requirement of section 553 is made explicit in the provisions of that section requiring a "concise general" statement of "basis and purpose." Although detailed findings of fact are not necessary, *see Camp* v. *Pitts*, 411 U.S. at 141-2 & n. 3, that statement cannot be so "concise" and "general" as to be merely conclusory. Thus, the agency must provide reasoned explanations for each of its specific determinations. *See Pillai* v. *CAB*, 485 F.2d 1018, 1023-31 (D.C. Cir. 1973).[32]

[32] If the statement of basis and purpose is so inadequate as to "frustrate effective judicial review," the remedy is for the court to remand to the agency to obtain additional explanation of the reasons for the agency decision. Camp v. Pitts, 411 U.S. at 142-43. Of course, the

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Moreover, the opportunity to comment is meaningless unless the agency responds to significant points raised by participants before it. *Portland Cement,* 486 F.2d at 393-94.[33] At a minimum, therefore, the statement of basis and purpose must refer to relevant submissions by participants and rebut or accept those submissions in an orderly and reasoned fashion.[34]

The Commission also fully complied with this requirement. The statement of basis and purpose accompanying the fuel

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explanation supplied by the agency on remand may not be simply a "post-hoc rationalization" for action that was essentially arbitrary when taken. See Burlington Truck Lines v. United States, 371 U.S. 156, 168-9 (1962). On the other hand, if after a thorough review of the full administrative record the court determines that the agency has failed to disclose fully the bases of its action, that substantive issues were raised by participants but not addressed by the agency or that the action taken is "not sustainable on the administrative record" made, the regulation must be set aside and the proceeding remanded to the agency for further action. Camp v. Pitts, 411 U.S. at 142-3; *Overton Park,* 401 U.S. at 420.

[33] Contrary to Judge Bazelon's suggestion, NRDC v. NRC, 547 F.2d at 657, *App.* 76, the necessity of enforcing this obligation imposes no hardship on the courts. In determining what issues raised by participants in a rulemaking are significant, the "arbitrary and capricious" standard should be employed. Thus, only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in the agency's proposal need be responded to by the agency. Comments which are purely speculative or do not disclose the factual basis on which they rely should require no response. *See Portland Cement,* 486 F.2d at 393-94.

[34] *See* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968):

> [The statement of basis and purpose] . . . must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. . . . [The record must] enable . . . [the court] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Accord, National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 701 (2d Cir.), *cert. denied,* 423 U.S. 827 (1975).

cycle rule addressed each substantive issue that had been raised in the rulemaking proceeding. And, in each instance the Commission set forth in detail the reasons for the final action which it took. *App.* 385-400.

In summary, section 553 of the APA provides a framework suitable for even sophisticated rulemakings without need for automatic resort to special procedural devices. The notice, comment, and statement of basis and purpose requirements of section 553 were fully complied with in the fuel cycle rulemaking. The court below therefore erred in invoking the complex nature of the issues present in that proceeding as a justification for demanding special procedures.

B. Absent Substantial Justification, A Court On Remanding For Further Action May Not Prescribe Procedures In Excess Of Those Required By Statute

The Court has recently had occasion to reaffirm the proper role of a reviewing court when remanding action found unsupported by the record before it.

> At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." SEC v. Chenery Corp. 332 U.S. 194, 196 (1947).

FPC v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).

The majority below, while feinting in the direction of this

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Court's holding in *Transcontinental Gas,* nonetheless proceeded to direct the use of extrastatutory procedures on remand without any justification, much less "substantial justification," for such procedures having been demonstrated during the rulemaking proceeding. In doing so the majority purportedly relied on a line of decisions which have indicated that a rulemaking participant may, in certain situations, challenge procedures which meet statutory minima but which nonetheless deny due process[35] or are inadequate to ensure the full disclosure necessary to develop an adequate record. *E.g., International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615 (D.C. Cir. 1973); *American Airlines, Inc.* v. *CAB,* 359 F.2d 624 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 843 (1966). This reliance is misplaced.

The cases cited by the court below, *NRDC* v. *NRC,* 547 F.2d at 643 n. 23, *App.* 43 n. 23 recognize that the complexities of modern rulemakings have placed greater burdens on the agencies, and ultimately on reviewing courts, to ensure compliance with substantive and procedural statutory obligations. At the same time, however, these decisions have made clear that in order to sustain a "due process" or "record" challenge to agency procedures, a participant during the rulemaking proceeding must make "circumscribed and justified requests" for additional procedures and the request must demonstrate that on "critical points . . . the general procedure . . . [is] inadequate to probe 'soft' and sensitive subjects." *International Harvester,* 478 F.2d at 631; *see also South Terminal Corp.* v. *EPA,* 504 F.2d 646 (1st Cir. 1974).

In other words, courts have not acceded to demands for special rulemaking procedures unless the petitioner has previ-

[35] This Court has recognized that when an agency is called upon to make a "quasi-judicial" determination in rulemaking additional procedures *may* be required by "due process" considerations. *Florida East Coast Ry.,* 410 U.S. at 242-45.

ously made to the agency a showing of substantial justification. This showing must consist of a demonstration that reliance on minimum statutory procedures alone would be fundamentally unfair,[36] that the agency would abuse its discretion by denying a request for additional procedures likely to improve significantly the quality of a critical portion of the record, or that a particular procedure is necessary to ensure the full disclosure mandated by the APA.[37]

In this case, the NRC employed rulemaking procedures which went beyond those required by the Atomic Energy Act or APA. CNI and NRDC alleged that these procedures were flawed because the Commission had not provided across-the-board rights to formal discovery and cross-examination. App. 844.[38] But they failed even to attempt to de-

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[36] It should be noted that procedural due process problems are more likely to arise in situations where an agency uses informal rulemaking procedures in promulgating standards which govern individual conduct but are not subject to case-by-case waivers. *Cf.* Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 638 n. 1 (1973) (Powell, J. concurring); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). For example, EPA, in adopting the criminally enforceable new source performance standards under section 306 of the Federal Water Pollution Control Act, 33 U.S.C. §1316 (Supp. V 1975), may not include in those standards a provision for waiver or variance. DuPont v. Train, 45 U.S.L.W. 4212, 4219 (U.S. Feb. 23, 1977). By contrast, all substantive rules of the NRC are subject to waiver on a case-by-case basis under 10 C.F.R. § 2.758 (1977).

[37] The court in *International Harvester* apparently found such "substantial justification" since it rejected petitioners' broad-based procedural challenges but still ordered the agency to provide, on remand, a limited opportunity for cross-examination. 478 F.2d at 649. There, however, rulemaking participants, through their submittals, had developed a detailed record which challenged the agency's conclusions and left the court "uncertain" whether the agency had correctly resolved several complex technical issues which were critical to achieving the substantive result intended by Congress. *Id.*

[38] The court below transmuted respondents' sweeping demands for cross-examination and discovery to the more diffuse allegation "that the procedures utilized by the Commission were in the aggregate inadequate. . . ." NRDC v. NRC, 547 F.2d at 644 n. 25, *App.* 45 n. 25.

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velop a record upon which the court could conclude that the procedures employed by the Commission were unfair or that cross-examination or any other special adversarial procedure was needed to ensure full disclosure or significantly improve the record.[39] The majority, ignoring this failure, simply declared the *International Harvester* test for substantial justification for additional procedures to have been met. *NRDC* v. *NRC*, 547 F.2d at 643-44 n. 25, *App.* 44-45 n. 25. It was not.[40]

CNI and NRDC made no attempt at the hearing to identify specific waste disposal issues which, in their view, required cross-examination for adequate exploration. Moreover, although their rulemaking submissions identified two

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See text 7, 10 *supra*. The majority then proceeded to examine the fuel cycle rulemaking record on the basis of this argument which was never made to the Hearing Board or the Commission but instead was fashioned by the court of appeals itself long after the rulemaking proceeding had ended.

[39] As the Commission stated when it promulgated the Uranium Fuel Cycle Rule:

> All parties were fully heard. Nothing offered was excluded. The record does not indicate that any evidentiary material would have been received under different procedures. Nor did the proponent of the strict "adjudicatory" approach make an offer of proof—or even remotely suggest—what substantive matters it would develop under differen[t] procedures.

39 Fed. Reg. 14188, 14189 (1974), App. 385, 389. CNI's failure to make a showing of need for additional procedures occurred in the face of repeated warnings by other participants, at the oral hearings and in written submissions to the Hearing Board, that the burden for such specification was upon CNI. *See* text 7 & note 5 *supra*.

[40] The statement by counsel for CNI and NRDC at the oral hearing, relied upon by the majority, merely recited their demands for an across-the-board right to cross-examination and commented generally on the testimony of Dr. Frank Pittman, the Regulatory Staff's witness on waste disposal matters, as follows:

> we are not satisfied with Mr. Pittman's well intentioned, but, we think, not at all well explained position with regard to the ability to handle nuclear wastes for hundred of thousands of years. . . .

NRDC v. NRC, 547 F.2d at 643-44 n. 25, *App.* 44-45 n. 25; Tr. 208, *App.* 837.

"examples" of subjects which, they asserted, did require cross-examination, these submissions evinced no concrete effort to identify and develop whatever inadequacies CNI and NRDC may have thought to exist in the testimony of Dr. Pittman and others.[41] Nor did CNI and NRDC attempt to show how the resolution of any specific factual issues of criti-

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[41] CNI and NRDC's only tangible attempt to show the need for cross-examination is found at page 26 of their "Statement with Respect to Legal Considerations," filed with the Board on March 2, 1973, a month after completion of the oral hearing. There, two brief portions of hearing dialogue were cited as evidence that "pervasive cross-examination" was a prerequisite to building an adequate record. Both colloquies involved questions put by Board members to the Regulatory Staff which, CNI and NRDC contended on appeal, were not completely answered. The first concerned standards applied by the Bureau of Mines and state governments, matters of only tangential pertinence to the rulemaking. Tr. 308-12, *App.* 912-16. The second related to calculations in the Environmental Survey. One Board member, Dr. John C. Geyer, requested data underlying certain statements made in the Environmental Survey, Tr. 121-28, *App.* 804-10; the Regulatory Staff witness' failure to respond fully prompted another Board member, Dr. J. J. Steindler, to comment later that there might well have been no need for Dr. Geyer's questions had these portions of the Survey been more fully documented. Tr. 139, *App.* 818. In their "Statement with Respect to Legal Considerations," CNI and NRDC asserted that cross-examination was necessary to obtain the data sought by Dr. Geyer. In fact, these data were fully supplied by the Regulatory Staff in its posthearing "Staff Summary Comments on Proceeding for Environmental Effects of the Uranium Fuel Cycle" (March 19, 1973). (The portions of that document dealing with reprocessing and waste management are reprinted at *App.* 1058-1066.) Since respondents never commented substantively on this issue, declining to avail themselves of the Hearing Board's direction to use supplementary comments "to highlight and point up the problems, and the questions . . . raised in the written and oral presentations of the other participants" (Tr. 6, *App.* 660) and since CNI and NRDC did not comment on the data supplied in the Regulatory Staff's "Summary Comments" (as Baltimore Gas and Electric Co., *et al*, and other participants did on CNI's comments), the episode stands not as a brief for cross-examination but rather as a paradigm both of the adequacy of the agency's procedures and of CNI and NRDC's failure to attempt to use them.

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cal importance would be dependent upon the use of any special procedure or procedures.[42]

To the contrary, as the court recognized, CNI and NRDC's principal concerns involved "philosophical issues," not factual issues. 547 F.2d at 652, *App.* 63. While additional adversarial opportunities may under certain circumstances be required to resolve complex factual matters, it is difficult to understand how such procedures are required to resolve "philosophical issues." In short, there was no justification, let alone substantial justification, for the court's order for special procedures on remand.[43]

It follows that the decision below contravenes the holdings of this and other federal courts which recognize that, in reviewing the adequacy of a rulemaking record, the court's function is to determine whether the agency has adequately set out the basis for its action. If it has not, the court can remand to the agency to supply the missing information. In remanding, however, the court cannot, absent "substantial justification for doing otherwise," dictate "the methods [or] procedures" for remedying the record. *Transcontinental Gas*, 423 U.S. at 333.

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[42] The court iself recognized that, with respect to their principal procedural demand, CNI and NRDC "did not show that . . . issues could not be explored except through cross-examination; nor did they attempt such a showing . . . ." 547 F. 2d at 644 n.25, *App.* 45 n.25.

[43] Thus, both the state of the record and the nature of CNI and NRDC's participation in the rulemaking below clearly distinguish this case from *International Harvester*. Rather, the circumstances here are similar to those in *South Terminal*. There, the court found the agency record inadequate and remanded for further proceedings even though the petitioners in that case, like CNI and NRDC, had done little or nothing to cure the record's inadequacies. 504 F. 2d at 665-66. On remand, the court required only that the agency's proceedings satisfy the minimum requirements of its organic statute and section 553 of the APA. *Id.* at 666-67.

CONCLUSION

For the foregoing reasons the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

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STATUTES AND REGULATIONS INVOLVED

1. Administrative Procedure Act §§ 4, 10(e), 5 U.S.C. §§ 553, 706 (1970)

§ 553. RULE MAKING.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public pro-

cedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 706. SCOPE OF REVIEW.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

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(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. **Atomic Energy Act of 1954 § 189, 42 U.S.C. § 2239 (1970)**

§ 2239.

Hearings and Judicial Review.—(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose

interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

3. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1970 & Supp. V 1975)

§ 4332. Cooperation of Agencies; Reports; Availability of Information; Recommendations; International and National Coordination of Efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public

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laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

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The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

4. 10 CFR § 51.20(e) (1977)

(e) In the Environmental Report required by paragraph (a) for light-water-cooled nuclear power reactors, the contribution of the environmental effects of uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, reprocessing of irradiated fuel, transportation of radioactive materials and management of

low level wastes and high level wastes related to uranium fuel cycle activities to the environmental costs of licensing the nuclear power reactor, shall be as set forth in the following table. No further discussion of such environmental effects shall be required. This paragraph does not apply to any applicant's environmental report submitted prior to June 6, 1974.

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TABLE S-3. — *Summary of environmental considerations for uranium fuel cycle*

[Normalized to model LWR annual fuel requirement]

Natural resource use	Total	Maximum effect per annual fuel requirement of model 1,000 MWe LWR
Land (acres):		
Temporarily committed	63	
Undisturbed area	45	
Disturbed area	18	Equivalent to 90 MWe coal-fired powerplant.
Permanently committed	4.6	
Overburden moved (millions of MT)	2.7	Equivalent to 90 MWe coal-fired powerplant.
Water (millions of gallons):		
Discharged to air	156	≈2 percent model 1,000 MWe LWR with cooling tower.
Discharged to water bodies	11,040	
Discharged to ground	123	
Total	11,319	<4 percent of model 1,000 MWe LWR with once-through cooling.
Fossil fuel:		
Electrical energy (thousands of MW-hour)	317	<5 percent of model 1,000 MWe LWR output.
Equivalent coal (thousands of MT)	115	Equivalent to the consumption of a 45 MWe coal-fired powerplant.
Natural gas (millions of scf)	92	<0.2 percent of model 1,000 MWe energy output.
Effluents—chemical (MT):		
Gases (including entrainment):[1]		
SO_x	4,400	
NO_x[2]	1,177	Equivalent to emissions from 45 MWe coal-fired plant for a year.
Hydrocarbons	13.5	
CO	28.7	
Particulates	1,156	
Other gases:		
F^-	.72	Principally from UF_6 production enrichment and reprocessing. Concentration within range of state standards—below level that has effects on human health.
Liquids:		
$SO_4^=$	10.3	From enrichment, fuel fabrication, and reprocessing steps. Components that constitute a potential for adverse environmental effect are present in dilute concentrations and receive additional dilution by receiving bodies of water to levels below permissible standards. The constituents that require dilution and the flow of dilution water are: NH_3—600 cfs. NO_3—20 cfs. Fluoride—70 cfs.
NO_3^-	26.7	
Fluoride	12.9	
Ca^{++}	5.4	
Cl^-	8.6	
Na^+	16.9	
NH_3	11.5	
Fe	.4	
Tailings solutions (thousands of MT)	240	From mills only—no significant effluents to environment.
Solids	91,000	Principally from mills—no significant effluents to environment.
Effluents—Radiological (curies):		
Gases (including entrainment):		
Rn-222	75	Principally from mills—maximum annual dose rate <4 percent of average natural background within 5 mi of mill. Results in 0.06 man-rem per annual fuel requirement.
Ra-226	.02	
Th-230	.02	
Uranium	.032	
Tritium (thousand)	16.7	Principally from fuel reprocessing plants—Whole body dose is 6 man-rem per annual fuel requirements for population within 50 mi radius. This is <0.007 percent of average natural background dose to this population. Release from Federal Waste Repository of 0.005 Ci/yr has been included in fission products and transuranics total.
Kr-85 (thousands)	350	
I-129	.0024	
I-131	.024	
Fission products and transuranics	1.01	
Liquids:		
Uranium and daughters	2.1	Principally from milling—included in tailings liquor and returned to ground—no effluents; therefore, no effect on environment.
Ra-226	.0034	From UF_6 production-concentration 5 percent of 10 CFR 20 for total processing of 27.5 model LWR annual fuel requirements.
Th-230	.0015	
Th-234	.01	From fuel fabrication plants—concentration 10 percent of 10 CFR 20 for total processing 26 annual fuel requirements for model LWR.
Ru-106[3]	.15	From reprocessing plants—maximum concentration 4 percent of 10 CFR 20 for total reprocessing of 26 annual fuel requirements for model LWR.
Tritium (thousands)	2.5	
Solids (buried):		
Other than high level	601	All except 1 Ci comes from mills—included in tailings returned to ground—no significant effluent to the environment. 1 Ci from conversion and fuel fabrication is buried.
Effluents — Thermal (billions of British Thermal Units)	3,260	<7 percent of model 1,000 MWe LWR.
Transportation (man-rem): Exposure of workers and general public.	.334	

[1] Estimated effluents based upon combustion of equivalent coal for power generation.
[2] 1.2 percent from natural gas use and process.
[3] Cs-137 (0.075 Ci/AFR) and Sr-90 (0.004 Ci/AFR) are also emitted.